

A brief exegesis of the proposed Copyright Directive

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The recently proposed new Copyright Directive¹ was released on 14 September 2016. It has been described as the pillar of the copyright package promised by the European Commission (EC), to be delivered before the end of Mr. Juncker's mandate, i.e. before the end of 2019. In its Communication of 6 May 2015,² the EC had stressed "*the importance to enhance cross-border access to copyright-protected content services, facilitate new uses in the fields of research and education, and clarify the role of online services in the distribution of works and other subject-matter.*"³ The proposed Copyright Directive is thus a key measure aiming to address two of these three issues.

We will concentrate on the third issue, carefully examining the text of both the explanatory memorandum and the Directive itself, in an attempt to assess whether it achieves these aims. We hope that this exercise will prove useful for the debate that has now begun both in the European Parliament and in the Council. We will begin with a brief assessment of the explanatory memorandum and then focus on the articles and recitals of the proposed Copyright Directive.

Our conclusions are:

1. A comprehensive re-assessment of Article 13 and Recital 39 is needed, with particular regard to the Charter of Fundamental Rights of the European Union⁴, the E-commerce Directive (in particular Article 15) and case law of the Court of Justice of the European Union⁵ case law. The proposed Copyright Directive does not expressly address the issue of its compatibility with either of these texts nor the CJEU case law.
2. Recital 38 does not clarify the scope and effect of Article 13. Rather, it creates confusion, as it goes against settled CJEU case law (relating to Articles 14 and 15 of the E-commerce Directive and Article 3 of the Infosoc Directive). Recital 38 should therefore be deleted or substantially re-drafted/re-phrased. If the EU wants to introduce a change in this regard it should clearly justify its choice. In any case, a recital in the preamble to a directive is not an appropriate tool to achieve this effect.

¹ European Commission, Proposal for a directive of the European Parliament and of the Council on copyright in the Digital Single Market, Brussels, 14.9.2016, COM(2016) 593 final (Proposed Copyright Directive).

² European Commission, Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions A Digital Single Market Strategy for Europe COM(2015) 192 final.

³ Proposed Copyright Directive, p. 2.

⁴ Hereafter EU Charter.

⁵ Hereafter CJEU.

1. The explanatory memorandum

This proposed Copyright Directive raises a number of concerns and questions. For the purpose of this statement we will focus upon one aspect of the proposal, i.e. the attempt to “*clarify the role of online services in the distribution of works and other subject-matter.*”⁶

However, the attempt to clarify the role of online services cannot be isolated from a second crucial objective, that is, an attempt to set forth “*measures aiming at improving the position of rightholders to negotiate and be remunerated for the exploitation of their content by online services giving access to user-uploaded content.*”⁷

In other words, the proposed Copyright Directive is trying to pursue two distinct objectives:

1. the clarification of the role of online services and
2. the regulation of online services used to host user-generated content with a view to reinforcing the position of rightholders vis-à-vis those online services.

How can the proposed Copyright Directive do both at the same time? Is it at all possible to pursue both objectives without reducing the domain and effect of liability exemptions to be found in the E-commerce Directive?⁸

Importantly, Articles 12 to 15 of the E-commerce Directive had been adopted to reduce the number of cases in which providers of three types of intermediary services could be found liable as well as to significantly reduce the number of their regulatory duties.

In particular, Article 15 entitled “[n]o general obligation to monitor” provides that:

1. Member States shall not impose a general obligation on providers, when providing the services covered by Articles 12, 13 and 14, to monitor the information which they transmit or store, nor a general obligation actively to seek facts or circumstances indicating illegal activity.

2. Member States may establish obligations for information society service providers promptly to inform the competent public authorities of alleged illegal activities undertaken or information provided by recipients of their service or obligations to communicate to the competent authorities, at their request, information enabling the identification of recipients of their service with whom they have storage agreements.

It is true that the proposed Copyright Directive is described as being “*consistent with the existing EU copyright legal framework.*”⁹ However, this is true because the E-commerce Directive is not, strictly speaking, a pillar of the copyright legal framework. It has a horizontal approach, which makes it relevant in some cases of copyright infringement, for example when the exception for temporary reproduction within Article 5 of the Infosoc Directive¹⁰ cannot be relied upon. Despite this obvious tension between the two instruments, there is no general statement regarding the consistency of the proposal with the E-commerce Directive.

⁶ Ibid, p. 2.

⁷ Ibid, p. 3.

⁸ Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (‘Directive on electronic commerce’) OJ L 157, 30.4.2004, p. 45–86.

⁹ Proposed Copyright Directive, p. 4.

¹⁰ Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society OJ L 167, 22.6.2001, p. 10–19.

The explanatory memorandum of the proposed Copyright Directive states that

*[t]he proposal imposes obligations on some information society services. However, these obligations remain reasonable in view of the nature of the services covered, the significant impact of these services on the online content market and the large amounts of copyright-protected content stored by these services.*¹¹

The EC is therefore proposing that the clarification of the role of online services requires the imposition of obligations upon certain categories of information society services. This explains why option 2 of the Impact Assessment¹² was chosen. Option 2 is actually described as

*an obligation for certain service providers to put in place appropriate technologies and fosters the conclusion of agreements with rightholders.*¹³

By obligations, one should understand new obligations. To quote once again the EC,

*[t]he proposal includes **new** obligations on some online services and on those to which authors and performers transfer their rights. These obligations may impose additional costs.*¹⁴

The EC introduces a caveat when it writes that “*some actors will not be subject to the obligation.*”¹⁵

However, this is where the picture starts to blur. In order to give an example as to when some actors will not be subject to the obligation, the EC refers to the obligation of transparency and **not** to the obligation to put in place appropriate technologies or even to foster the conclusion of agreements. “*For instance, the transparency obligation will not apply when the administrative costs it implies are disproportionate in view of the generated revenues,*” writes the EC.

The EC does add that “*as for the obligation on online services, it **only** applies to information society services storing and giving access to large amounts of copyright-protected content uploaded by their users.*”¹⁶ However, this in itself is not enough to clarify what the scope of Article 13 actually is, as it does not explain whether the characterisations of “*information society services storing and giving access to large amounts of copyright-protected content uploaded by their users*” and of hosting providers for the purposes of Article 14 of the E-commerce Directive **are exclusive or not**. Moreover, it is not clear at all what is meant by “*large amounts of copyright-protected content.*” Potentially, a wide variety of services could be caught, including services like Wikipedia¹⁷ or Medium.¹⁸

Interestingly, the explanatory memorandum dedicates a paragraph to fundamental rights but this is done first and foremost to mention the importance of Article 17(2)¹⁹ of the EU Charter. It is then stated that the proposed Copyright Directive

has a limited impact on the freedom to conduct a business and on the freedom of expression and information, as recognised respectively by Articles 16 and 11 of the Charter, due to the

¹¹ Proposed Copyright Directive, p. 5.

¹² Option 2 is described as “[a]n obligation on online services which store and give access to large amounts of content uploaded by their users to put in place appropriate technologies and to increase transparency vis-a-vis rightholders” in Commission Staff Working Document - Impact Assessment on the modernisation of EU copyright rules - Part 1, SWD(2016) 301 final, p. 146.

¹³ Proposed Copyright Directive, p. 8.

¹⁴ Ibid, p. 9.

¹⁵ Ibid, p. 9.

¹⁶ Ibid, p. 9.

¹⁷ <https://www.wikipedia.org/>.

¹⁸ <https://medium.com/>.

¹⁹ i.e. rights to intellectual property.

*mitigation measures put in place and a balanced approach to the obligations set on the relevant stakeholders.*²⁰

No explanation is however provided to support this point, be it in the explanatory memorandum or in the impact assessment. Crucially, all fundamental rights identified by the CJEU as relevant to the balancing exercise should be accounted for – yet data protection and privacy (which were emphasised in the *Promusicae*²¹ and *Scarlet/Sabam*²² cases) are not even mentioned.

As it will be argued below, a comprehensive assessment of the compatibility of the proposal with the EU Charter is necessary given the evolution of the CJEU case law in this field.

²⁰ Proposed Copyright Directive, p. 9.

²¹ Case C-275/06 *Promusicae*, 29 January 2008, ECLI:EU:C:2008:54, para. 64.

²² Case C-70/10, *Scarlet Extended SA v Société belge des auteurs, compositeurs et éditeurs SCRL (SABAM)*, 24 November 2011, ECLI:EU:C:2011:771, e.g. para. 50.

2. The Proposed Copyright Directive

2.1 THE CORE

Article 1(2) of the Proposed Copyright Directive provides that:

Except in the cases referred to in Article 6, this Directive shall leave intact and shall in no way affect existing rules laid down in the Directives currently in force in this area, in particular Directives 96/9/EC, 2001/29/EC, 2006/115/EC, 2009/24/EC, 2012/28/EU and 2014/26/EU.

Nowhere does it say that the proposed Copyright Directive shall leave intact the E-commerce Directive as well. The only place where Directive 2000/31/EC is mentioned is in Recital 38, where it is mentioned twice, but where the formulation adopted, as explained below, appears highly problematic.

To continue with **Article 13**, which certainly represents the binding part of this new piece of legislation, it is entitled “[u]se of protected content by information society service providers storing and giving access to large amounts of works and other subject-matter uploaded by their users” and comprises three paragraphs. We have chosen to reproduce them here entirely for the sake of clarity:

- 1. Information society service providers that store and provide to the public access to large amounts of works or other subject-matter uploaded by their users shall, in cooperation with rightholders, take measures to ensure the functioning of agreements concluded with rightholders for the use of their works or other subject-matter or to prevent the availability on their services of works or other subject-matter identified by rightholders through the cooperation with the service providers. Those measures, such as the use of effective content recognition technologies, shall be appropriate and proportionate. The service providers shall provide rightholders with adequate information on the functioning and the deployment of the measures, as well as, when relevant, adequate reporting on the recognition and use of the works and other subject-matter.*
- 2. Member States shall ensure that the service providers referred to in paragraph 1 put in place complaints and redress mechanisms that are available to users in case of disputes over the application of the measures referred to in paragraph 1.*
- 3. Member States shall facilitate, where appropriate, the cooperation between the information society service providers and rightholders through stakeholder dialogues to define best practices, such as appropriate and proportionate content recognition technologies, taking into account, among others, the nature of the services, the availability of the technologies and their effectiveness in light of technological developments.*

Conflict with the e-Commerce Directive

Article 13 targets “information society service providers that store and provide to the public access to large amounts of works or other subject-matter uploaded by their users.”

This definition should be compared with the definition to be found in the E-commerce Directive in its Article 14 concerning the provision of hosting services. Hosting services, which are information society service as well as intermediary services, are defined as services that “consists of the storage of information provided by a recipient of the service.”²³ The definition of hosting services thus

²³ E-commerce Directive, Article 14.

appears broader than the provision of services that “*store and provide to the public access to large amounts of works or other subject-matter uploaded by their users.*”

It would therefore seem reasonable to argue that “*information society service providers that store and provide to the public access to large amounts of works or other subject-matter uploaded by their users*” are also intermediary providers in the sense of the E-commerce Directive. This would thus mean that the former cannot be held liable for third party content unless they fail to meet a certain number of conditions (as listed by Article 14) and that they cannot be subjected to general monitoring obligations under Article 15 of the E-commerce Directive.

Yet, Article 13 imposes upon these online service providers an obligation to take at least one type of measures:

to ensure the functioning of agreements concluded with rightholders for the use of their works or other subject-matter

or

to prevent the availability on their services of works or other subject-matter identified by rightholders through the cooperation with the service providers.

Examining Article 13 on its own, and because these two types of measures are described as being alternative, one can try to explain Article 13 by stating that “*information society service providers that store and provide to the public access to large amounts of works or other subject-matter uploaded by their users*” can still in some cases be considered to be *prima facie* hosting providers within the meaning of Article 14 of the E-commerce Directive.

Nevertheless, the effect of Article 15 of the E-commerce Directive appears to have been narrowed down in the **sense that these online service providers have now an obligation, in collaboration with rightholders, to systematically for the entirety of their user and users’ content basis, i.e. generally, monitor the contents transmitted by their users in order to prevent copyright infringement.** This is confirmed by paragraph 3 of Recital 38 as mentioned below.

This thus means that an exception to Article 15(1) has been carved out in the field of copyright.

Conflict with the CJEU Case Law

A clear and extensive explanation as to why an exception to Article 15(1) would be legitimate is all the more warranted considering that the CJEU has already delivered a judgment in a case in which both content recognition technologies and “*information society service providers that store and provide to the public access to large amounts of works or other subject-matter uploaded by their users*” were at stake.²⁴ Furthermore, in that very case (Sabam/Netlog), the CJEU refused to impose upon the service provider at stake an obligation to systematically monitor the contents transmitted by their users, not only on the ground of Article 15 of the E-commerce Directive but also on the ground of Articles 8, 11 and 16 of the EU Charter. **The EC would therefore need to explain how the imposition of an obligation to systematically monitor the contents transmitted by a whole user basis is now compatible with Articles 8, 11 and 16 of the EU Charter.**

Sabam/Netlog made it clear that the injunction claimed for would have had the effect of forcing the service provider to introduce, for all its customers, in abstracto and as a preventative measure, at its own cost and for an unlimited period, a system for filtering most of the information which was stored on its servers in order to identify on its servers electronic files containing musical, cinematographic

²⁴ Case C-360/10 *Belgische Vereniging van Auteurs, Componisten en Uitgevers CVBA (SABAM) v Netlog NV*, 16 February 2012, ECLI:EU:C:2012:85.

or audio-visual work in respect of which Sabam claimed to hold rights, and subsequently that it blocked the exchange of such files.²⁵

The CJEU thus described in Sabam/Netlog what is now called by the EC an obligation to implement content recognition technologies.

The CJEU answered by finding that such an order would indeed require the service provider:

to install a system for filtering:

- *information which is stored on its servers by its service users;*
- *which applies indiscriminately to all of those users;*
- *as a preventative measure;*
- *exclusively at its expense; and*
- *for an unlimited period,*

*which is capable of identifying electronic files containing musical, cinematographic or audiovisual work in respect of which the applicant for the injunction claims to hold intellectual property rights, with a view to preventing those works from being made available to the public in breach of copyright.*²⁶

In brief, the CJEU found that an order of this kind would be incompatible with EU law.

Requiring that filtering systems be put in place in such a way that rightholders identify the works to be protected (i.e. through arguably the licensing of protected works in order to build and implement content identification databases), as Article 13 of the proposed Copyright Directive sets it forth, does not automatically save the measure on the basis of Article 16 of the EU Charter. This is true even if the intention was to create an exception to the benefit of the service providers targeted by Article 13 to allow them to build and implement content recognition technologies. Furthermore, it has not been clearly established that a real market for content recognition technologies exist.

Conflict with the EU Charter

In any case, the foregoing would certainly not solve the issue of the incompatibility of a filtering obligation with Articles 8 and 11 of the EU Charter. On this point, it should not be accepted too quickly that content recognition technologies solve all problems, as they are not able to take into account context in order to avoid suppressing lawful uses of content, for example cases of copyright content being merely cited, parodied or reviewed. Any such filtering would be in breach of the requirement for restrictions on fundamental right to be foreseen by law. In addition, Article 52 of the EU Charter requires that limitations to the exercise of the rights and freedoms

*be made only if they are **necessary** and **genuinely meet objectives** of general interest recognised by the Union or the need to protect the rights and freedoms of others.*

Furthermore, and this is essential, the CJEU did not imply in Sabam/Netlog that if the database of protected works is produced in collaboration with rightholders themselves, the order at stake would become compatible with EU law. In other words, **the CJEU did not imply in Sabam/Netlog that if the database of protected works is produced in collaboration with rightholders themselves, the general obligation to monitor imposed upon the service provider would thus be transformed into a permissible, special obligation to monitor.**

²⁵ Ibid, para. 23.

²⁶ Ibid, ruling.

The collaboration with rightholders is only relevant for the purposes of determining whether the implementation of the filtering measures would be done at the sole expense of the service provider. Besides, in Sabam/Netlog, the only way (at least realistically) the social media platform could have tried to comply with the order claimed for by the Belgian associations of authors, composers and publishers (Sabam) would have been through the means of content recognition technologies, e.g. Audible Magic. In the Scarlet/Sabam saga, the first instance Tribunal had issued its order on the basis of an expert report that had found in 2007 that Audible Magic was the sole technology worth considering,²⁷ although it was not adapted to the volume of Internet Service Provider traffic.²⁸ **As a result, and this has not been stressed enough, the argument that the proposed Copyright Directive is a *lex specialis* does not suffice to eliminate the human rights challenges raised in Sabam/Netlog, which was precisely about copyright and copyright infringements only.**

Other Case law and Legislative Intent

Characterising an obligation to put in place content recognition technologies as a general monitoring obligation is consistent with the letter of the E-commerce Directive, the intention of the EU legislator at the time of the adoption of the E-commerce Directive and other CJEU's rulings, including *L'Oréal v eBay*.²⁹

Article 15(2) of the E-commerce Directive only identifies **one type of measure**: the transfer of information from providers of intermediary services to competent authorities including law enforcement agencies, and, in particular, the transfer of information enabling the identification of Internet users. It is true that Recital 47 of the E-commerce Directive states that

[m]ember States are prevented from imposing a monitoring obligation on service providers only with respect to obligations of a general nature; this does not concern monitoring obligations in a specific case and, in particular, does not affect orders by national authorities in accordance with national legislation.

But Recital 47 does not state that it is possible to impose general monitoring obligations as a result of an order issued in a specific case.

In addition, the European Commission (Internal Market DG) in its letter of 13 June 2000 to Mrs Cederschiold³⁰ made it clear that the duty of care mentioned in Recital 48 of the E-commerce Directive should not undermine Article 15(1) and could

*for instance consist in the making available of complaint-systems or in the operation of notice and take down procedures and hot-lines. By contrast, any general obligation to monitor or supervise data which are transmitted or stored will not be possible under the directive, given the clear wording of Article 15 para1.*³¹

²⁷ CA Bruxelles, 9e Chambre, *Scarlet v. Sabam*, 28 January 2010, R.G.: 2007/AR/2424, p. 4 : "A l'exception de la solution proposée par Audible Magic, toutes les solutions tentent d'empêcher l'utilisation des réseaux peer to peer, indépendamment du contenu qui y est véhiculé."

²⁸ *Ibid*, p. 5:

La solution proposée par la société Audible Magic est donc la seule à tenter de répondre à la problématique de manière spécifique. Cette solution, essentiellement destinée au monde éducatif, n'est cependant pas intrinsèquement dimensionnée pour répondre au volume de trafic d'un FAI. Le recours à cette technique dans le contexte FAI induit de ce fait un coût d'acquisition et d'exploitation élevé pour compenser ce sous dimensionnement.

²⁹ Case C-324/09, *L'Oréal SA and Others v eBay International AG and Others*, 12 July 2011, ECLI:EU:C:2011:474.

³⁰ European Commission, Internal Market DG, Letter to Mrs Cederschiold, 13 June 2000, D(200) 274m <https://www.asktheeu.org/en/request/2250/response/7914/attach/html/2/letter%20Mog%20to%20MEP.pdf.html>.

³¹ *Ibid*.

Moreover, in *L'Oréal v eBay* the CJEU read together Article 15 of the E-commerce Directive and Article 3 of the IPR Enforcement Directive³² and stated that:

*a general monitoring obligation would be incompatible with Article 3 of Directive 2004/48, which states that the measures referred to by the directive must be fair and proportionate and must not be excessively costly.*³³

The Court added that while an injunction could not have the object or effect of imposing a general monitoring obligation upon a provider of intermediary services, it would be permissible to order more targeted measures, such as the suspension of “*the perpetrator of the infringement of intellectual property rights.*”³⁴

What is more, the EC does not seem to opine that transparency obligation and redress mechanisms to the benefits of users are a fundamental requirement. Paragraph 2 of Article 13 does not try to fully balance the needs for transparency and effective redress with the needs for copyright protection. It only requires Member States (and not service providers) to “*ensure*” that service providers put in place complaints and redress mechanisms. Yet, the CJEU in *Telekabel*,³⁵ in the context of blocking at the network level, did seem to go further when it required at paragraph 57 that

*the national procedural rules must provide a possibility for internet users to assert their rights before the court once the implementing measures taken by the internet service provider are known.*³⁶

While blocking at the network level does not rely upon the same type of technologies as filtering at the application level through the means of content recognition technologies, these two types of content restriction both systematically target the whole user basis of a service provider, and both threaten the same internet user rights identified in the *Scarlet/Sabam* and *Telekabel* cases.

Finally, Article 13 seems to imply that in several cases “*information society service providers that store and provide to the public access to large amounts of works or other subject-matter uploaded by their users*” will require a licence for their use of protected works. This is confirmed by Recital 38 as explained below.

To summarise, Article 13 seems to be incompatible with EU law (including both secondary legislation and the EU Charter), as interpreted by the CJEU. This holds true for three reasons:

1. It imposes upon certain types of providers of intermediary services (“*information society service providers that store and provide to the public access to large amounts of works or other subject-matter uploaded by their users*”) a general obligation to monitor their platforms.
2. It ignores transparency obligations to the benefits of users (including providers of user-generated content).
3. It seems to imply that in several cases certain types of providers of intermediary services (“*information society service providers that store and provide to the public*”

³² Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights, OJ L 157, 30.04.2004.

³³ *L'Oréal v eBay*, para. 139.

³⁴ *Ibid*, para. 141.

³⁵ Case C-314/12, *UPC Telekabel Wien GmbH v Constantin Film Verleih GmbH, Wega Filmproduktionsgesellschaft mbH*, 27 March 2014, ECLI:EU:C:2014:192. It is true that the *Telekabel* judgment is also problematic in as much as it fails to take into account the rights to privacy and data protection as protected by Article 7 and 8 of the EU Charter and makes it possible for a judge to issue an injunction without a prior assessment of the technology to be put in place for that purpose.

³⁶ *Ibid*, para. 57.

access to large amounts of works or other subject-matter uploaded by their users”) will require a licence for their “use” of protected works.

2.2 THE RECITALS

The Directive also includes two recitals which are particularly problematic. This is because they seem to suggest that the characterisations of “*information society service providers that store and provide to the public access to large amounts of works or other subject-matter uploaded by their users*” and hosting providers within the meaning of Article 14 of the E-commerce Directive should be conceived in most cases as exclusive. In addition, in all cases “*information society service providers that store and provide to the public access to large amounts of works or other subject-matter uploaded by their users*” are required to put in place content recognition technologies.

While **Recital 39** restate the importance of the collaboration between rightholders and “*information society service providers that store and provide to the public access to large amounts of works or other subject-matter uploaded by their users*” and transparency obligations to the benefit of rightholders, Recital 38 muddies the water further.

Recital 38 states:

Where information society service providers store and provide access to the public to copyright protected works or other subject-matter uploaded by their users, thereby going beyond the mere provision of physical facilities and performing an act of communication to the public, they are obliged to conclude licensing agreements with rightholders, unless they are eligible for the liability exemption provided in Article 14 of Directive 2000/31/EC of the European Parliament and of the Council.

In respect of Article 14, it is necessary to verify whether the service provider plays an active role, including by optimising the presentation of the uploaded works or subject-matter or promoting them, irrespective of the nature of the means used therefor.

In order to ensure the functioning of any licensing agreement, information society service providers storing and providing access to the public to large amounts of copyright protected works or other subject-matter uploaded by their users should take appropriate and proportionate measures to ensure protection of works or other subject-matter, such as implementing effective technologies. This obligation should also apply when the information society service providers are eligible for the liability exemption provided in Article 14 of Directive 2000/31/EC.

Recital 38 appears to start from the assumption that “*information society service providers [that] store and provide access to the public to copyright protected works or other subject-matter uploaded by their users*” (note that here the requirement of a large amount has disappeared) should not as a matter of principle be considered intermediary providers and thereby hosting providers for the purposes of Article 14 of the E-commerce Directive since they are not, as a matter of principle, passive providers. This is confirmed by the presence of the “*unless*” clause at the end of the sentence.

Yet, the reasoning of the CJEU in *Google v Vuitton* was exactly the opposite. Referencing service providers should be considered hosting providers for the purposes of Article 14 of the E-commerce Directive unless they are not passive. The CJEU started by noting that:

With regard to the referencing service at issue in the cases in the main proceedings, it is apparent from the files and from the description in paragraph 23 et seq. of the present judgment that, with the help of software which it has developed, Google processes the data entered by advertisers and the resulting display of the ads is made under conditions which

*Google controls. Thus, Google determines the order of display according to, inter alia, the remuneration paid by the advertisers.*³⁷

This was not enough to make Google an active intermediary provider. It was only after consideration of “*the role played by Google in the drafting of the commercial message which accompanies the advertising link or in the establishment or selection of keyword*”³⁸ that Google could have been found to be an active service provider.

Likewise in *L’Oréal v eBay*, the CJEU held that

*the fact that the service provided by the operator of an online marketplace includes the storage of information transmitted to it by its customer-sellers is not in itself a sufficient ground for concluding that that service falls, in all situations, within the scope of Article 14(1) of Directive 2000/31.*³⁹

In addition, the first part of the second paragraph of Recital 38 does appear to be a rough codification of *L’Oréal v eBay*. This is because it loosens the test set by the CJEU in *L’Oréal v eBay*. Notably, the open-ended nature of “*irrespective of the means used*” undermines the codified test considerably. While it is true that the clarity of the CJEU’s judgments could be improved, the EC should have provided an explanation as to why the proposal chose to reformulate the test laid down by the CJEU in *L’Oréal v eBay*. In this case the CJEU ruled that:

- *the mere fact that the operator of an online marketplace stores offers for sale on its server, sets the terms of its service, is remunerated for that service and provides general information to its customers cannot have the effect of denying it the exemptions from liability provided for by Directive 2000/31 (see, by analogy, Google France and Google, paragraph 116).*⁴⁰
- *Where, by contrast, the operator has provided assistance which entails, in particular, optimising the presentation of the offers for sale in question or promoting those offers, it must be considered not to have taken a neutral position between the customer-seller concerned and potential buyers but to have played an active role of such a kind as to give it knowledge of, or control over, the data relating to those offers for sale.*⁴¹

The CJEU therefore presumed knowledge or control from the optimisation of the presentation of the offers. However, **the CJEU did not go as far as saying that that presumption was irrebutable and thereby universally applicable.**

Above all, it is important to understand that a hosting service could be protected for most user uploads but not for a featured “staff favourites” section or content it commissioned or some other distinct feature of the service. Deciding that Article 14 immunity is lost for the whole service when the provider optimises some offers would be over restrictive and would not be in line with the ratio legis underlying section 4 (on intermediary providers) of the E-commerce Directive.

Finally, and this is where the EC should really have gone into further details, Recital 38 seems to assume that as a matter of principle “*information society service providers [that] store and provide access to the public to copyright protected works or other subject-matter uploaded by their users*” are prima facie copyright infringers and thereby are primarily responsible for the communication of the works to the public.

³⁷ Joined Cases C-236/08 to C-238/08, *Google France SARL and Google Inc. v Louis Vuitton Malletier SA, Google France SARL v Viaticum SA and Luteciel SARL and Google France SARL v Centre national de recherche en relations humaines (CNRRH) SARL and Others*, 23 March 2010, ECLI:EU:C:2010:159, Para. 115.

³⁸ *Ibid*, para. 118.

³⁹ *L’Oréal v eBay*, para. 111.

⁴⁰ *Ibid*, para. 115.

⁴¹ *Ibid*, para. 116.

Once again this starting assumption does not appropriately reflect the CJEU case law. On the contrary, this is directly incompatible with the latter. The judgments of the CJEU are more nuanced for at least two reasons: the key intervention of the service provider seems to be an important consideration,⁴² as well is the knowledge of the service provider.⁴³ Knowledge and inducement in particular have been, more or less explicitly, determinative factors in national cases such as in France⁴⁴, in Germany⁴⁵ or in the UK⁴⁶ in order to determine whether a provider of intermediary services could be characterised as a *prima facie* copyright infringer.

As GS Media seems to offer the most expansive interpretation of Article 3 of the Infosoc Directive,⁴⁷ it is worth quoting once again the CJEU:

- *As the Court has previously held, the concept of ‘communication to the public’ includes two cumulative criteria, namely, an ‘act of communication’ of a work and the communication of that work to a ‘public’.*⁴⁸
- *[A]ccount has to be taken of several complementary criteria, which are not autonomous and are interdependent. Since those criteria may, in different situations, be present to widely varying degrees, they must be applied both individually and in their interaction with one another.*⁴⁹
- *Of those criteria, the Court emphasised, in the first place, the indispensable role played by the user and the deliberate nature of its intervention. The user makes an act of communication when it intervenes, **in full knowledge of the consequences of its action**, to give access to a protected work to its customers, and does so, in particular, **where, in the absence of that intervention, its customers would not, in principle, be able to enjoy the broadcast work.***⁵⁰
- *Moreover, it is settled case-law of the Court that, to be categorised as a ‘communication to the public’, a protected work must be communicated using specific technical means, different from those previously used or, failing that, to a ‘new public’, that is to say, to a public that was not already taken into account by the copyright holders when they authorised the initial communication to the public of their work.*⁵¹
- *In the third place, the Court has held that it is relevant that a ‘communication’, within the meaning of Article 3(1) of Directive 2001/29, is of a **profit-making nature.***⁵²

It is true that at para. 51 the CJEU adds:

⁴² Case C-160/15 GS Media BV v Sanoma Media Netherlands BV and Others, 8 September 2016, ECLI:EU:C:2016:644, para. 35.

⁴³ Ibid, para. 33.

⁴⁴ See e.g. TGI Paris, 29 janvier 2015, SARL KARE Production et a. c/ Youtube et a., www.juriscom.net.

⁴⁵ See e.g. Decision Oberlandesgericht (Court of Appeal) Hamburg of July 1, 2015, file no. 5 U 87/12 and Landgericht (District Court) Munich I of 30 June 2015, file no. 33 O. 9639/14.

⁴⁶ See Twentieth Century Fox Film Corp v Newzbin Ltd [2010] EWHC 608 (Ch). This case was actually the only case to even consider holding an intermediary liable for communicating protected works to the public and this was ruled on the basis of a deliberate intervention. Subsequent Case law falls back on the doctrines of authorisation and joint tortfeasance.

⁴⁷ Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society OJ L 167, 22.6.2001, p. 10–19.

⁴⁸ GS Media, para. 32.

⁴⁹ Ibid, para. 34.

⁵⁰ Ibid, para. 35.

⁵¹ Ibid, para. 37.

⁵² Ibid, para. 38.

*when the posting of hyperlinks is carried out for profit, it can be expected that the person who posted such a link carries out the necessary checks to ensure that the work concerned is not illegally published on the website to which those hyperlinks lead, so that it must be presumed that that posting has occurred with the full knowledge of the protected nature of that work and the possible lack of consent to publication on the internet by the copyright holder. In such circumstances, and in so far as that rebuttable presumption is not rebutted, the act of posting a hyperlink to a work which was illegally placed on the internet constitutes a ‘communication to the public’ within the meaning of Article 3(1) of Directive 2001/29.*⁵³

However, and this is crucial, as stated by the CJEU, such a presumption once again is not irrebutable. In any case, **it is not always reasonable to expect that a provider of hyperlinks “carr[y] out the necessary checks to ensure that the work concerned is not illegally published” as holding otherwise would directly undermine Article 15 of the E-commerce Directive.**

Furthermore, it was never the intention of the EU legislature, be it on the basis of the E-commerce Directive or the Infosoc Directive, to harmonise the conditions for secondary liability of providers of intermediary services.

Yet, what Recital 38 seems to aim at is even more radical: to harmonise conditions of primary liability that would be applicable to providers of intermediary services.

It is true that Recital 38 seems to suggest that Article 14 of the E-commerce Directive could potentially be applicable even in cases in which service providers are *prima facie* (primary) copyright infringer. However, such an approach certainly does not reflect solutions adopted in several Member States, and e.g. France,⁵⁴ Germany,⁵⁵ Italy,⁵⁶ Belgium⁵⁷, Spain⁵⁸ or the UK.⁵⁹ In the French Dailymotion case for example the behaviour of the video-sharing platform was assessed on the basis of a ground alternative to that of copyright infringement.

Besides, as the Advocate General Poiares Maduro noted in *Google v Vuitton* in the context of trade mark infringement:

*The goal of trade mark proprietors is to extend the scope of trade mark protection to cover actions by a party that may contribute to a trade mark infringement by a third party. This is usually known in the United States as ‘contributory infringement’, but to my knowledge such an approach is foreign to trade mark protection in Europe, where the matter is normally addressed through the laws on liability.*⁶⁰

The same appears to be true in the field of copyright.

Finally, even assuming Article 14 of the E-commerce Directive could be applicable when providers of intermediary services are found to be *prima facie* primary infringers, it remains that Article 13 can

⁵³ Ibid, para. 51.

⁵⁴ See e.g. Cour d’appel de Paris, Pôle 5 – Chambre 1, arrêt du 2 décembre 2014, TF1 et autres / Dailymotion, www.legalis.net; TGI Paris, 29 janvier 2015, SARL KARE Production et a. c/ Youtube et a., www.juriscom.net.

⁵⁵ See e.g. Decision Oberlandesgericht (Court of Appeal) Hamburg of July 1, 2015, file no. 5 U 87/12 and Landgericht (District Court) Munich I of 30 June 2015, file no. 33 O. 9639/14.

⁵⁶ See e.g. Corte di Appello di Milano, 7 gennaio 2015, n. 29., [www. http://www.ricercagiuridica.com](http://www.ricercagiuridica.com).

⁵⁷ See e.g. *Google Inc v Copiepresse SCRL* Tribunal de Première Instance (Brussels), 13 February 2007, [2007] E.C.D.R. 5.

⁵⁸ See e.g. Judgment n° 11/2014, Civil Provincial Court of Madrid, 14 January 2014, ECLI:ES:APM:2014:4, [www. http://www.poderjudicial.es/search/indexAN.jsp](http://www.poderjudicial.es/search/indexAN.jsp).

⁵⁹ See e.g. *Twentieth Century Fox Film Corp v Newzbin Ltd* [2010] EWHC 608 (Ch).

⁶⁰ *France SARL and Google Inc. v Louis Vuitton Malletier SA, Google France SARL v Viaticum SA and Luteciel SARL and Google France SARL v Centre national de recherche en relations humaines (CNRRH) SARL and Others*, 22 September 2009, ECLI:EU:C:2009:569, para. 48.

hardly be combined with Article 15 of the E-commerce. Recital 38 confirms that content recognition technologies should be implemented in all cases by the service providers targeted by Article 13.

As the foregoing shows, Recital 38 does not clarify the domain and effect of Article 13 of the proposed Copyright Directive. On the contrary, it creates confusion as it goes against the existing CJEU case law:

- it does not properly reflect the domain of Articles 14 and 15 of the E-commerce Directive, as interpreted by the CJEU, and,
- it does not reflect the domain of Article 3 of the Infosoc Directive, as interpreted by the CJEU.

As a result, the basis which the Directive assumes for imposing an obligation to conclude licensing agreements disappears. Recital 38 should therefore be deleted or substantially re-drafted/re-phrased. If the EU wants to introduce a change in this regard it should clearly justify its choice. In any case, a Recital is not an appropriate tool to achieve this effect.

To summarise, Recital 39 confirms the need to re-assess Article 13 in the light of the EU Charter and the E-commerce Directive, as it requires collaboration between rightholders and certain types of providers of intermediary services (*“information society service providers that store and provide to the public access to large amounts of works or other subject-matter uploaded by their users”*) and imposes on these providers transparency obligations only to the benefit of rightholders.

In addition, Recital 38 does not seem to be compatible with EU law including both the E-commerce Directive and the Infosoc Directive, as interpreted by the CJEU. This holds true at least for three reasons:

1. Recital 38 seems to reduce the domain of Article 14 of the E-commerce Directive, as interpreted by the CJEU.
2. It imposes a general monitoring obligation on certain types of providers of intermediary services (*“information society service providers that store and provide to the public access to large amounts of works or other subject-matter uploaded by their users”*).
3. It adopts a far-reaching interpretation of the right to communicate protected works to the public, which does not reflect the CJEU case law on Article 3 of the Infosoc Directive.

3. Conclusion

In conclusion, we are therefore proposing the adoption or implementation of two measures:

1. A comprehensive re-assessment of Article 13 and Recital 39 in the light of the EU Charter and the E-commerce Directive (in particular Article 15), including the CJEU case law;
2. The deletion or the substantial re-drafting/re-phrasing of Recital 38.